

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

MARK DURANTE,

Plaintiff,

VS.

**KEVIN DURANT, K. DURANT
ENTERPRISES, LLC, NIKE, INC. and
PANINI AMERICA, INC.,**

Defendants.

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CIVIL ACTION NO. 1:12-cv-04913

**ORIGINAL ANSWER OF DEFENDANTS
KEVIN DURANT AND K. DURANT ENTERPRISES, LLC**

Subject to and without waving their defenses under FED. R. CIV. P. 12(b)(2) and 12(b)(6) Defendants Kevin Durant and K. Durant Enterprises, LLC (collectively “Durant Defendants” or “Durant”) file this Original Answer to the Verified Complaint (“Complaint”) filed by Plaintiff Mark Durante (“Plaintiff” or “Durante”), and respectfully show the Court as follows:

**I.
ORIGINAL ANSWER**

1. Durant lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 1 of the Complaint, and therefore denies those allegations.

2. Durant admits the allegations contained in Paragraph 2 of the Complaint.

3. With respect to the allegations contained in Paragraph 3 of the Complaint, Durant admits that K. Durant Enterprises, LLC is a Washington limited liability company with its principal place of business in Oklahoma City, Oklahoma. Durant otherwise denies the allegations contained in Paragraph 3 of the Complaint.

4. Durant lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 4 of the Complaint, and therefore denies those allegations.

5. Durant lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 5 of the Complaint, and therefore denies those allegations.

6. With respect to the allegations contained in Paragraph 6 of the Complaint, Durant admits that Plaintiff has asserted a claim for violation of the Lanham Act and that this Court has subject matter jurisdiction over this case. Durant otherwise denies the allegations contained in Paragraph 6 of the Complaint.

7. Durant denies the allegations in Paragraph 7 of the Complaint.

8. Durant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 8 of the Complaint, and therefore denies those allegations.

9. Durant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 9 of the Complaint, and therefore denies those allegations.

10. Durant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 10 of the Complaint, and therefore denies those allegations.

11. Durant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 11 of the Complaint, and therefore denies those allegations.

12. Durant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 12 of the Complaint, and therefore denies those allegations.

13. Durant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 13 of the Complaint, and therefore denies those allegations.

14. Durant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 14 of the Complaint, and therefore denies those allegations.

15. Durant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 15 of the Complaint, and therefore denies those allegations.

16. Durant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 16 of the Complaint, and therefore denies those allegations.

17. With respect to the allegations contained in Paragraph 17 of the Complaint, Durant admits that Exhibit A to the Complaint appears to be a copy of a certificate for Reg. No. 3,748,227 issued to a Mark N. Durante for “durantula” as used on certain goods in International Class 9 (electrical and scientific apparatus), and that the certificate speaks for itself. Durant specifically denies that Reg. No. 3,748,227 was issued in recognition of any goodwill built up by Durante as an entertainer or celebrity persona, and is otherwise without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 17 of the Complaint, and therefore denies those allegations.

18. Durant admits the allegations contained in Paragraph 18 of the Complaint.

19. Durant admits the allegations contained in Paragraph 19 of the Complaint.

20. With respect to the allegations contained in Paragraph 20 of the Complaint, Durant admits that he is a well-known NBA basketball player and has entered into endorsement contracts with Nike, Gatorade, Sprint, EA Sports, and Degree Men. Durant otherwise denies the allegations contained in Paragraph 20 of the Complaint.

21. Durant admits that he received media and fan attention in 2010, but denies the remaining allegations contained in Paragraph 21 of the Complaint.

22. With respect to the allegations contained in Paragraph 22 of the Complaint, Durant admits that Exhibit B of the Complaint appears to be a copy of a letter dated September 15, 2010 from Darren S. Cahr to Aaron Goodwin, Kevin Durant's former agent, and that the letter speaks for itself. Durant otherwise denies the allegations contained in Paragraph 22 of the Complaint.

23. With respect to the allegations contained in Paragraph 23 of the Complaint, Durant admits that Exhibit C of the Complaint appears to be a string of emails, including an email dated September 20, 2010 from Eric Goodwin to Darren S. Cahr, and that the email chain speaks for itself. Durant otherwise denies the allegations contained in Paragraph 23 of the Complaint.

24. With respect to the allegations contained in Paragraph 24 of the Complaint, Durant admits that Exhibits D through H appear to contain internet screenshots, the content of which speaks for themselves. Durant otherwise denies the allegations contained in Paragraph 24 of the Complaint.

25. Durant denies the allegations contained in Paragraph 25 of the Complaint.

26. Durant denies the allegations contained in Paragraph 26 of the Complaint.

27. With respect to the allegations contained in Paragraph 27 of the Complaint, Durant admits that Exhibit I of the Complaint appears to be a copy of a letter dated June 6, 2012 from Darren S. Cahr to Rob Pelinka, Kevin Durant's current agent, and that the letter speaks for itself. Durant otherwise denies the allegations contained in Paragraph 27 of the Complaint.

28. With respect to the allegations contained in Paragraph 28 of the Complaint, Durant admits that Exhibit J of the Complaint appears to be a copy of a letter dated June 11, 2012 from Erika Williams to Darren S. Cahr, and that the letter speaks for itself. Durant otherwise denies the allegations contained in Paragraph 28 of the Complaint.

29. Durant denies the allegations contained in Paragraph 29 of the Complaint.

30. Durant denies the allegations contained in Paragraph 30 of the Complaint.

31. Durant denies the allegations contained in Paragraph 31 of the Complaint.

32. With respect to the allegations contained in Paragraph 32 of the Complaint, Durant repeats and re-alleges its answers to Paragraphs 1 through 31 of the Complaint as if fully set forth herein.

33. With respect to the allegations contained in Paragraph 33 of the Complaint, Durant admits that Reg. No. 3,748,227 was issued to Mark N. Durante (United States Individual), but denies that such registration is valid, and is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained therein, and therefore denies those allegations.

34. With respect to the allegations contained in Paragraph 34 of the Complaint, Durant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained therein, and therefore denies those allegations.

35. With respect to the allegations contained in Paragraph 35 of the Complaint, Durant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained therein, and therefore denies those allegations.

36. Durant denies the allegations contained in Paragraph 36 of the Complaint.

37. Durant denies the allegations contained in Paragraph 37 of the Complaint.

38. Durant denies the allegations contained in Paragraph 38 of the Complaint.

39. With respect to the allegations contained in Paragraph 39 of the Complaint, Durant repeats and re-alleges its answers to Paragraphs 1 through 38 of the Complaint as if fully set forth herein.

40. Durant admits that certain members of the media and NBA fans have referred to him throughout his career by the name “Durantula” and recognize him by that name, but denies the remaining allegations contained in Paragraph 40 of the Complaint.

41. Durant denies the allegations contained in Paragraph 41 of the Complaint.

42. Durant denies the allegations contained in Paragraph 42 of the Complaint.

43. With respect to the allegations contained in Paragraph 43 of the Complaint, Durant repeats and re-alleges its answers to Paragraphs 1 through 42 of the Complaint as if fully set forth herein.

44. Durant denies the allegations contained in Paragraph 44 of the Complaint.

45. Durant denies the allegations contained in Paragraph 45 of the Complaint.

46. Durant denies the allegations contained in Paragraph 46 of the Complaint.

47. Durant denies the allegations contained in Paragraph 47 of the Complaint.

48. Durant denies that Plaintiff is entitled to any of the relief requested in the Prayer for Relief and concluding paragraphs of the Complaint.

49. All allegations contained in the Complaint not specifically admitted above are expressly denied.

II.

AFFIRMATIVE DEFENSES

Durant asserts the following affirmative defenses that, in whole or in part, bar recovery under the claims alleged by Plaintiff. Durant asserts each of the following matters as affirmative defenses out of an abundance of caution, and does not thereby intend to relieve Plaintiff of his burden of proof, shift the burden of proof with respect to any such matters, or otherwise assume a burden of proof that otherwise lies with Plaintiff. Durant reserves the right to amend this Answer to add additional affirmative defenses consistent with the facts discovered in the case. All other defenses asserted below and subsequent pleadings filed in this matter by Durant are expressly made subject to and without waiving the Rule 12 defenses asserted below.

1. Plaintiff's claims against Durant are barred because the Court lacks personal jurisdiction over the Durant Defendants pursuant to Federal Rule of Civil Procedure 12(b)(2). Durant expressly reserves the right to file a Motion to Dismiss pursuant to Rule 12(b)(2).

2. Plaintiff's claims against Durant are barred because the Complaint fails to state a claim upon which relief can be granted. Durant expressly reserves the right to file a motion to dismiss under Rule 12(b)(6).

3. Plaintiff's claims are barred, in whole or in part, because Durant has not used and is not using the nickname "Durantula" as a trademark or a service mark.

4. Plaintiff's claims are barred, in whole or in part, because third parties, including the media and NBA fans, bestowed the nickname "Durantula" on Durant and came to identify that name with Durant separate and apart from, and prior to, any use of the "Durantula" name by Durant.

5. Plaintiff's claims are barred, in whole or in part, because the term "Durantula" is commonly used by third parties, including the media and NBA fans, who are not referring to Plaintiff.

6. Plaintiff's claims are barred, in whole or in part, because the limited use of the name "Durantula" has been used descriptively to refer to Durant by a name to which he is referred by third parties, including the media and NBA fans, and Durant has not used the term as an indicator of source for any goods or services.

7. Plaintiff's claims are barred, in whole or in part, because to the extent the name "Durantula" is widely known by consumers as a reference to Durant, that is the result of use of the nickname by third parties, including the media and NBA fans, and is not due to any marketing, promotion or advertising of goods under the alleged mark by Durant.

8. Plaintiff's claims are barred, in whole or in part, by the doctrine of fair use.

9. Plaintiff's claims are barred, in whole or in part, because use of the name "Durantula" in reference to Durant is not false or misleading.

10. Plaintiff's claims are barred, in whole or in part, because the name "Durantula" as used by Plaintiff does not function as a mark.

11. Plaintiff's claims are barred, in whole or in part, because the name "Durantula" as used by Plaintiff is not inherently distinctive and Plaintiff did not and cannot establish secondary meaning in the name prior to any use of the name "Durantula" by or in reference to Durant.

12. Plaintiff's claims are barred, in whole or in part, because "Durantula" as used by Plaintiff is not a famous mark.

13. Plaintiff's claims are barred, in whole or in part, because use of the name "Durantula" in reference to Durant does not impair the distinctiveness of any legitimate mark owned by Plaintiff.

14. Plaintiff's claims are barred, in whole or in part, because use of the name "Durantula" in reference to Durant is not likely to cause confusion, or to cause mistake, or to deceive.

15. Plaintiff's claims are barred, in whole or in part, because to the extent Plaintiff has any legitimate trademark rights in the name "Durantula," the mark is conceptually weak as used by Plaintiff.

16. Plaintiff's claims are barred, in whole or in part, because of unclean hands.

17. Plaintiff's claims are barred, in whole or in part, because Plaintiff committed fraud in procuring Reg. No. 3,748,227 in that he knowingly made false, material representations in a sworn declaration submitted to the PTO, which, upon information and belief, were made with the intent to deceive the PTO. In that regard, the PTO's initial refusal to register the applied-for mark was based in part on the fact that "Durantula" was used by Plaintiff only as his name and did not function as a mark. In response, Plaintiff amended his application and included the statement: "The name ... shown in the mark identifies Mark Durante, whose consent(s) to register is submitted." The PTO again refused registration based in part on the fact that "Durantula" was merely Plaintiff's name or pseudonym and did not function as a mark. In response, Plaintiff again amended his application, this time falsely stating, under oath: "The name ... shown in the mark does not identify a particular living individual." Thereafter, Reg. No. 3,748,227 was ultimately issued with the false statement on the face of the registration

certificate that “THE NAME ... SHOWN IN THE MARK DOES NOT IDENTIFY A PARTICULAR LIVING INDIVIDUAL.”

18. Plaintiff’s claims are barred, in whole or in part, because, as used by Plaintiff the name “Durantula” is primarily a surname or personal name referring to Plaintiff and is not inherently distinctive or capable of registration without proof of secondary meaning. Because Plaintiff failed to submit proof of secondary meaning to the PTO, Reg. 3,748,227 is invalid under § 2(e) of the Lanham Act and should not have issued.

19. Plaintiff’s claims are barred, in whole or in part, because Plaintiff has alleged that the consuming public would have recognized Durant as “Durantula,” and if true at the time Plaintiff applied to register “Durantula” as a mark, Reg. 3,748,227 is invalid under § 2(a) of the Lanham Act and should not have issued.

20. Plaintiff’s claims are barred, in whole or in part, because Plaintiff and Durant are not competitors.

21. Plaintiff’s claims are barred, in whole or in part, because Plaintiff is not a consumer.

22. Plaintiff’s claims are barred, in whole or in part, because there is no likelihood that consumers doing business with Plaintiff will mistakenly believe they are dealing with Durant.

23. Plaintiff’s claims are barred, in whole or in part, because Plaintiff’s own acts or omissions caused or contributed to Plaintiff’s injury, if any.

24. Plaintiff’s claims are barred, in whole or in part, because Plaintiff’s alleged injury, if any, were caused by the conduct or acts of parties other than Durant.

25. Plaintiff's claims, are barred, in whole or in part, including Plaintiff's claims for statutory, punitive and/or exemplary damages, because Durant did not act deliberately, wantonly, knowingly, willfully or intentionally.

26. Plaintiff's claims for punitive and/or exemplary damages are unreasonable, unconstitutionally excessive and Plaintiff has asserted no rational basis for recovery. Further, the relief sought violates the Fifth and Fourteenth Amendments to the United States Constitution by seeking to deprive Durant of due process or due course of law; it violates the Eighth Amendment of the United States Constitution by seeking to impose an excessive fine on Durant; and it violates the Fourteenth Amendment of the United States Constitution by seeking to deny Durant equal protection of the laws of the United States.

III. **PRAYER**

WHEREFORE, PREMISES CONSIDERED, as to the entirety of Plaintiff's Complaint, and any supplement or amendment thereto, Defendants Kevin Durant and K. Durant Enterprises, LLC respectfully request that this Court:

- a. find that Plaintiff take nothing against Durant by his claims alleged in the Complaint, and any supplement or amendment thereto;
- b. dismiss Plaintiff's Complaint, and any supplement or amendment thereto, with prejudice, and award Durant his costs, interest, and attorney's fees and expenses incurred in defending this action; and
- c. award Durant any and all other general and equitable relief that this Court may deem just and proper.

Respectfully submitted,

By: /s/ Jeffrey D. Migit

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ATTORNEYS FOR DEFENDANTS KEVIN
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CERTIFICATE OF SERVICE

This is to certify that on the 13th day of November, 2012, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court, Northern District of Illinois, using the electronic case filing system of the Court. The electronic case filing sent a Notice of Electronic Filing to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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/s/ Jeffrey D. Migit

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